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IN THE

Supreme Court of The United States

October Term, 1968

No. 741

FRED O. DICKINSON, JR., COMPTROLLER
OF THE STATE OF FLORIDA.
Appellant.

v.

THE FIRST NATIONAL BANK OF HOMESTEAD.
HOMESTEAD, FLORIDA.
and
OKALOOSA NATIONAL BANK.
NICEVILLE, FLORIDA.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. TALLAHASSEE DIVISION

PETITION FOR RE-HEARING

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Tallahassee, Florida 32304

TABLE OF CASES AND RULINGS

	Page
First Agricultural National Bank of Berkshire County v. State Tax Commission 392 U. S. 339 (1968)	3
Merchants', etc. Bank v. Pennsylvania 167 U. S. 461 (1897)	3
State v. Clement National Bank 78 A. 944, 84 Vt. 167, Aff'd 231 U. S. 120 (1911)	3
Liberty National Bank & Trust Co. v. Buscaylia (Ct. App. N. Y. 1967), 21 N. Y. 2d 357, 22 N.Y. 2d 973, 235 N E. 2d 101	6
Internal Revenue Bulletin, Cum. Bul, 1963-2, p. 858	3, 4

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Appellant presents it's Petition for a Re-Hearing of the above entitled cause, and, in support thereof, respectfully shows:

GROUNDS FOR RE-HEARING

I

At the time of the issuance of the opinion of the Supreme Court dated January 20, 1969, this case was pending in the Supreme Court on the Jurisdictional Statement of Appellant pursuant to 28 U.S.C. § 1253, to which the Appellees had filed their Motion to Dismiss and/or Affirm.

The Opinion of the Court in this cause was as follows:

> "Per Curiam.
>
> The motion to affirm is granted and the judgment is affirmed.
>
> Mr. Justice Stewart is of the opinion that probable jurisdiction should be noted.
>
> Mr. Justice Fortas took no part in the consideration or decision of this case."

The Court thus disposed of this case on its merits without consideration of a printed record, briefs of counsel, or allowing the Appellant the opportunity to give oral argument. The Court did so even though Appellees' Motion

and Appellant's jurisdictional statement set out the reasons why the decision of the Three-Judge District Court is incorrect and must be reversed or remanded for further clarification.

II

Appellees, in their Motion, relied on the case of **First Agricultural National Bank of Berkshire County vs. State Tax Commission,** 392 U. S. 339, (1968). This case involved a sales and use tax where the legal incidence of the tax was said to have been imposed on a Federal instrumentality. This Court found it unnecessary to determine the Constitutional and factual questions of whether national banks should today be considered tax immune as Federal instrumentalities.

The present case involves, among other things, the collection of documentary stamp taxes where the legal incidence of the tax falls on private parties and where national banks, as in the case of competitive state banks and like institutions, are mere collection agents for the State of Florida. This Court has ruled on previous occasions that national banks can be made agencies of the state for collection purposes. **Merchant', etc., Bank v. Pennsylvania,** 167 U. S. 461 (1897); **State v. Clement Nat. Bank,** 78 A. 94, 84 Vt. 167, aff'd 231 U. S. 120, (1911). Appellees conceded this fact on Page 5 of their Motion to Dismiss and/or Affirm and attempted to read this "collection agent" exception into the Order of the Three-Judge

District Court. It is not there. The result is confusion in the State of Florida and the nation in that the effect of such immunity poses further questions of economic advantage and discrimination. It is imperative that this court resolve the issues and/or clarify the Order of the Three-Judge District Court after hearing the merits of the cause.

III

National banks have evolved from governmental in 1864 to private organizations for profit today with a concomitant withdrawal of governmental functions. With respect to the imposition of Florida's non-discriminatory documentary stamp tax on notes, mortgages or other evidences of debt held by national banks, the foundation of which partially lies upon the repeal of 26 U.S.C., § 4361 by Public Law 89–44, Title 4, Paragraph 401(b), 79 Stat. 148 as noted in § 201.021, Florida Statutes (1967), it is not only paradoxical but impossible to reconcile the decision on appeal with the ruling of the United States Treasury Department.

The Treasury Department in which the Comptroller of the Currency serves (see e.g. United States Government Organization Manual, 1968–69, pp 97, 107), ruled in 1963 that national banks are not an "agency or instrumentality of the United States" under the Internal Revenue Code, as follows:

Section 4384.—Liability For Tax 26 CFR 47.4384-1: Liability for tax. Rev. Rul. 63–217

"National Banks frequently are parties to conveyances of realty. Under the provisions of section 4384 of the Internal Revenue Code of 1954, as amended, the United States or any agency or instrumentality thereof shall not be liable for the documentary stamp tax on conveyances of realty, imposed by section 4361 of the Code, with respect to an instrument to which it is a party.

"Held, the exemption from liability provided by section 4384 of the Code does not apply to a national bank which is a party to a conveyance of realty, **since such a bank, being a private corporation, is not an 'agency or instrumentality' of the United States** for purposes of that section of the Code." (Emphasis Supplied.)

IV

Apart from any Constitutional or factual issues involved herein, there is positive congressional authority under 12 U.S.C. 548 for the uniform imposition and levy on all banks, at the same identical rate as set forth in Section 201.15, Florida Statues (1967), of a documentary stamp tax on shares of stock and capital debentures issued by national banks and Appellees concede in their Motion to Dismiss and/or Affirm that the intangible personal

property tax levied on shares of stock under the provisions of § 199.141 is not in issue. Said tax is not levied at a greater rate than that levied on other "moneyed capital." The inconsistencies of the decision of the Lower Court with paramount Federal law and the decisions of the Supreme Court of the United States raise substantial questions that require consideration on the merits.

V

This case involves substantial Constitutional issues under the "equal protection" provision and the Supremacy Clause of the Tenth Amendment to the United States Constitution. This Court has not resolved these issues as they apply to private profit making banks classified as national banks, private profit making banks classified as state banks and other similar competitive institutions. These Constitutional issues are also raised in the New York case of **Liberty National Bank & Trust Co. v. Buscaylia** (Ct. App. N. Y. 1967), 21 N. Y. 2d 357, 235 N. E. 2d 101, reargued January 24, 1969, in relation to the sales and use tax and both cases warrant a hearing before this Court on the merits.

CONCLUSION

In the light of the above, we respectfully submit that this Court should grant this Petition for Re-Hearing and give to the parties an opportunity to brief the cause on its merits and orally argue the great questions of law presented herein or, in the alternative, should vacate the decision of the Federal Three-Judge Court below, and remand the cause for further clarification.

Respectfully submitted,

Earl Faircloth
Attorney General

T. T. Turnbull
Chief Trial Counsel

Paul Reed Toomey
Chief, Tax Division

CERTIFICATE

I hereby certify that on the_____day of February, 1969, I served a copy of the foregoing Petition for Re-Hearing upon the several parties as follows:.

On The First National Bank of Homestead, Homestead, Florida, and Okaloosa National Bank at Niceville, Niceville, Florida, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record, as follows:

TO: O. Ralph Matousek, Esq., Attorney for the First National Bank of Homestead, Homestead, Florida
234 North Krome Avenue, Homestead, Florida 33030

TO: James E. Moore, Esq., Attorney for Okaloosa National Bank at Niceville, Niceville, Florida
Post Office Box 476, Niceville, Florida

T. T. TURNBULL
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FRED O. DICKINSON, JR.

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Tallahassee, Florida 32304

CERTIFICATE OF COUNSEL

I, T. T. TURNBULL, do hereby certify that the above and foregoing Petition for Re-Hearing is presented in good faith and not for delay.

EARL FAIRCLOTH
Attorney General

T. T. TURNBULL
Chief Trial Counsel

PAUL REED TOOMEY
Chief, Tax Division